86-313

Supreme Court, U.S.
FILED
AUG 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GRECIA GONZALEZ,

Petitioner,

v.

PUBLIC HEALTH TRUST, a/k/a
JACKSON MEMORIAL HOSPITAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

27pp

QUESTION PRESENTED

Whether in an employment discrimination case tried to a jury under 42 U.S.C. Sections 1981 and 1983 the determination letter of the Equal Employment Opportunity Commission must be admitted into evidence when offered by a party to the cause?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

GRECIA GONZALEZ,

Petitioner,

v.

PUBLIC HEALTH TRUST a/k/a
JACKSON MEMORIAL HOSPITAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Grecia Gonzalez petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, ___) is not reported. The Judgment of the District Court (App. B, ___) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 28, 1986. A Petition for Rehearing was de-

nied on June 6, 1986 (App.C ___). The Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES AND RULE INVOLVED

1. 42 U.S.C. §1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. 42 U.S.C. §1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Rule 803 (8)(C) Federal Rules of Evidence provides:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstance indicate lack of trust worthiness."

STATEMENT

The Petitioner, Plaintiff in the U.S. District Court for the Southern District of Florida, sued her employer, Public Health Trust d/b/a Jackson Memorial Hospital[1] for employment discrimination and for forbidden retaliatory action under 42 U.S.C. §2000 e-2, 42 U.S.C. §1981 and 42 U.S.C. §1983 (R.1-1-1 to 10). Jurisdiction was vested in the District Court by 28 U.S.C. §1343.

As is usual in these cases, the litigation began when Ms. Gonzalez filed a charge with the Equal Employment Opportunity Commission that she had been prevented from obtaining a promotion because of national origin discrimination (R.1-26-3). After this initial charge was filed, the Petitioner filed another charge with the EEOC, alleging that her employer had retaliated against her in the terms and conditions of employment.

Ms. Gonzalez obtained a right to sue letter before the EEOC could make a determination on the merits

[1] The Public Health Trust is a State agency for the purposes of 42 U.S.C. §1983.

of her first charge (R.1-26-3). However, the EEOC did reach the merits of the Petitioner's second charge. It found that there was no reasonable cause to believe that the allegation regarding retaliation was true (Def. Exhibit 99, App.D ___).

The complaint embodied both charges and the case proceeded to trial on both charges. The alleged violations of §2000 e-2 were tried to the Court while the alleged §1981 and §1983 violations were simultaneously tried to a jury.

During the course of trial, the Public Health Trust offered into evidence the EEOC's one page determination letter containing the "no reasonable cause" finding (R.2-57, Def. Exhibit 99, App. D ___). Counsel for Ms. Gonzalez objected to the introduction of the letter on the ground of heresay (R.2-57). Counsel also argued that the letter should not be admitted unless the entire EEOC file was also admitted (R.2-57).

Counsel for the employer argued that the determination letter was admissable under the Fifth Circuit's Decision in *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972).[2] Relying on *Smith*, the trial court admitted the document into evidence (R.2-63).

The Petitioner abandoned her retaliation claim at the close of the Plaintiff's case (R.2-87), but failed to move to strike the determination letter. Later, in closing argument, counsel for the employer referred to

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[2] *Smith* is binding precedent in the 11th Circuit under the ruling in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) that all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981 are binding precedent in the 11th Circuit.

the EEOC's finding as an indication of Ms. Gonzalez' tendency to file discrimination complaints without any basis for them (R.3-225).

The trial court charged the jury regarding the EEOC determination as follows:

> "During the course of the trial, you have heard evidence concerning a determination of the Equal Employment Opportunity Commission. The EEOC is a government agency that investigates claims of employment discrimination. An EEOC determination is considered *highly probative* of the issues involved in discrimination cases. However, the EEOC determination is non dispositive and you may give it as great or as little weight as you determine it merits." (Emphasis added) (R.30-240).

No objection was made to the foregoing remarks to the jury by counsel, nor to the instruction.

On appeal, the 11th Circuit affirmed the admissability of the determination letter stating that precedent in that Circuit holds that a determination by the EEOC is not only admissable evidence, but is "highly probative" of the issues involved in discrimination cases, citing *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972); and *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1554 n.4 (11th Cir.1983), cert. den. -U.S.- 104 S.Ct. 2385 (1984).

The 11th Circuit then went on to hold that the failure to ask the trial court to strike the letter and the failure to object to the charge prevented the Petitioner from challenging the use of the letter on appeal even though the retaliation charge had been

dismissed. Finally, the court ruled that the trial court's ruling concerning the EEOC letter was not "plain error" resulting in a miscarriage of justice.

Based on these rulings, the 11th Circuit affirmed the judgment of the trial court.

REASONS FOR GRANTING PETITION

The Courts of Appeal for the 5th,[3] 9th,[4] and 11th[5] Circuits have adopted the rule followed in this case that the EEOC reasonable cause determination is "highly probative" of the ultimate issue involved in employment discrimination cases and that it is reversible error for a trial court to refuse to admit it.

Six Circuits disagree with the rule that the EEOC determination report is per se admissable and hold that the trial court may, in its discretion, refuse to

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[3] *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir.1972). *Smith* was based on a construction of the Federal Business Records Act, 28 U.S.C. §1732, (repealed 1975). The rule of *Smith*, that the EEOC determination is per se admissable was continued under the authority of Fed.R.Evid. 803 (8)(C) in *Garcia v. Gloor*, 618 Fed.2d 264 (5th Cir.1980) and was extended to cases tried before a jury in *McClure v. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985).

[4] *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066 (9th Cir.1978). Extended to jury trials, *Plummer v. Western International Hotels*, 656 F.2d 502 (9th Cir.1981).

[5] *Bell v. Birmingham Linen Services*, 715 F.2d 1552 (11th Cir.1983) cert den. U.S. , 104 S.Ct. 2785. The decision below extends the rule to jury cases.

admit it.[6] Two Circuits have expressly disagreed with the holding that the report is "highly probative", finding instead, that it has little probative value, *Johnson v. Yellow Freight System, Inc.*, supra, n.6 (8th Cir.); *Denny v. Hutchinson Sales Corporation*, supra, n.6 (10th Cir.). The Seventh Circuit has approved the statement in *Johnson* that "EEOC determinations are not homogenous products; they vary greatly in quality and factual detail", *Tulloss v. Near North Montessori School, Inc.*, 776 F.2d 150, 153 (7th Cir. 1985).

The Seventh Circuit cogently observed in *Tulloss*, 776 F.2d at 153, that in cases tried before a judge only, the two rules, although theoretically different, are functionally similar. This is because in the circuits that apply the per se rule, the trial judge has the discretion to give as much or as little weight to the report as he deems appropriate, *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157-158 (5th Cir.1972); *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1069 (9th Cir.1978).

Experienced trial judges realize that the parties to an employment discrimination case are entitled to a trial de novo and that the outcome of that trial is entirely dependent on the evidence presented in the court room. Trial judges also recognize that the EEOC report is based upon an ex parte investigation whose thoroughness and reliability cannot be assumed and

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[6] *Walton v. Eaton Corporation*, 563 F.2d 66 (3rd Cir.1977); *Cox v. Babcock and Wilcox Company*, 471 F.2d 13 (4th Cir.1972); *Heard v. Mueller Company*, 464 F.2d 190 (6th Cir.1972); *Tullos v. Near North Montessori School, Inc.*, 776 F.2d 150 (7th Cir. 1985); *Johnson v. Yellow Freight System, Inc.* 734 F.2d 1304 (8th Cir.1984) cert den. U.S. , 105 S.Ct.525; *Denny v. Hutchinson Sales Corporation*, 649 F.2d 816 (10th Cir.1981).

whose trustworthiness can only be determined by a thorough evaluation of the EEOC file. Trial courts are therefore likely to give the report little or no weight, see, *Tulloss*, supra, 776 F.2d at 154; *Hilton v. Wyman-Gordon Company*, 624 F.2d 379 (1st Cir.1980); *Barnes v. Atlantic Steel Co.*, 26 F.E.P. Cases 1054 (D.C.N.D. Ga. 1981).

A different situation exists when the case is tried before a jury. The circuits generally agree that it is not error to exclude from evidence the EEOC investigation file, *Tulloss*, supra, 776 F.2d at 154. In the present case, counsel for Ms. Gonzalez argued that the report should not be admitted without the simultaneous admission of the EEOC file (R.2-57), but neither side offerred it.[7] Consequently, the jury had no means of evaluating the trustworthiness of the report.

The Eighth Circuit in *Johnson*, supra, stated that although EEOC reports are admissable under Fed.R.Evid. 803 (8)(C)[8], problems resulting from their admission may outway their probative value. Such problems may include unfair prejudice to a party, the length of time a party may have to spend exposing

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[7] Petitioner's counsel told the trial court that he tried to obtain the file, but was unable to do so (R.2-57).

[8] The Eighth Circuit cited the Supreme Court's opinion in *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39, 96 S.Ct.1949, 1961, 48 L.Ed 2d 416 (1976) as authority for the admissability of EEOC reports. Chandler dealt with the admissability of an administrative decision arrived at after a hearing, not a report based on an ex parte investigation and therefore is not direct authority for the admission of EEOC reports. However, in this petition, it is assumed that the report is admissable under appropriate circumstances.

the weaknesses of the report, and the inability of a party to cross-examine the report in the same way she could cross-examine an adverse witness, 734 F.2d at 1309.

The trial judge in *Johnson* had noted that the admission of the determination report would have necessitated the taking of additional evidence to apprise the jury of the nature and extent of the EEOC investigation. The Eighth Circuit commented in approval that ". . . when the probative value of evidence is minimal, a court may weigh the value of evidence against the fact that to admit it would prolong the trial", 734 F.2d at 1309-1310.

The Tenth Circuit made similar observations in *Denny v. Hutchinson Sales Corporation,* supra, where it stated its belief that the trial judge is the first and best judge of whether tendered evidence meets the standard of trustworthiness and reliability set out in Fed.R.Evid. 803 (8)(C), 649 F.2d at 821. The Tenth Circuit concluded its discussion with the comment that the admission of the report[9] might give rise to the real possibility that the jury would give undue deference to such evidence, 649 F.2d at 822.

The "per se" rule followed in this case deprives the trial judge of the flexibility accorded by the circuits adhering to the "discretionary" rule. In *McClure v. Mexia Independent School District,* 750 F.2d 396 (5th Cir.1985) the Fifth Circuit construed *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir.1972) to hold that a report cannot be rejected unless it is both harmful and non-probative.

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[9] The report in *Denny* was from the Colorado Civil Rights Commission. The difference in investigatory agencies is of no significance.

In as much as the EEOC report had been held in *Smith* to be "highly probative", a tautology was created that leaves little room for a trial judge to reject a report. The court said that under Rule 803 (8)(C) a report may be held inadmissable if the sources of information or other circumstances indicate the lack of trustworthiness, 750 F.2d at 400. This attempt to provide some degree of flexibility is illusory, because *Smith* rejected objections based on the hearsay nature of the investigation and the fact that the report contains opinions of the investigator.

Thus, the per se rule would permit a trial judge to rule against admission only if a party could prove that some outrageous act or failure on the part of the EEOC entirely vitiated the report's findings. This is a very heavy evidentiary burden for any party to bear, and it is especially onerous where the objecting party is a plaintiff with limited resources.

The adoption of the per se rule, along with its underlying rationale that the EEOC's reasonable cause determination is "highly probative" leads inevitably to a jury instruction in which the jury is admonished that the report is, in fact, highly probative.[10] Despite the fact that the jury may also be told that it can weigh the report in the same manner as any other piece of evidence, the instruction is likely to be

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[10] The Eleventh Circuit did not determine the correctness of the instruction given in this case because the petitioner did not preserve the issue by noting an objection in the trial court. Because of the foregoing ruling, the petitioner is not seeking review of the instruction by this court. Petitioner assumes that the instruction was correctly given, but points out that the use of such an instruction is one of the adverse effects of the per se rule.

construed as a command that the jury rule for the party favored by the EEOC. The reason for this is that the jury in most cases will not have access to the EEOC file and therefore will not be able to properly evaluate the report. If it holds contrary to the finding of the EEOC, it will have to do so despite "highly probative" evidence supporting a different result.

The Tenth Circuit's worry in *Denny*, supra, that the jury might give undue deference to the report is virtually certain to become a reality where such an instruction is given. The error underlying the per se rule is the judicial finding, without a factual basis, that the EEOC report is always probative. Without that rationale, there is no basis for denying trial judges the flexibility accorded to them by the Circuits adopting the discretionary rule.

The per se rule will inevitably introduce an unfair element into all employment discrimination cases tried to a jury. The adverse effect that the continued use of the per se rule will have on the fact finding processes of juries is a highly appropriate reason for this Court to exercise its discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be granted.

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APPENDIX

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APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5497
Non-Argument Calendar

GRECIA GONZALEZ,
Plaintiff-Appellant,

versus

DADE COUNTY PUBLIC HEALTH TRUST
d/b/a JACKSON MEMORIAL HOSPITAL,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(April 28, 1986)

Before FAY, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

Appellant, Grecia Gonzalez, filed suit against the Dade County Public Health Trust d/b/a Jackson Memorial Hospital in the District Court for the Southern District of Florida alleging discrimination on the basis of national origin under Title VII, 42 U.S.C.S. 1981, 42 U.S.C. § 1983 for failure to promote, and for retaliation against her in violation of Title VII. She appeals, as clearly erroneous, the trial court's findings of fact and conclusions of law

dismissing her claims of discrimination and finding in favor of defendant. She further argues that since she withdrew her retaliation claims, the trial court erred in not withdrawing from consideration by the jury the EEOC "no-cause" determination with respect to her retaliation claim. We disagree and affirm the decisions of the trial court.

The Court of Appeals will not set aside a district court's findings of fact unless they are clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L.E. 2d 66 (1982). Here, the record provides ample evidence to support the trial court's findings of fact and conclusions of law that appellant failed to prove her Title VII discrimination claim against appellee.

The EEOC letter at issue was offered and received into evidence during trial. Appellant's objection to the letter as inadmissible hearsay was properly overruled by the trial court. The courts in this circuit have consistently held that a determination by EEOC is not only admissable evidence, but "highly probative" of the issues involved in discrimination cases. Smith v. Universal Services, Inc., 454 F.2d 154, 157 (5th Cir. 1972); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1554 n.4 (11th Cir. 1983), *cert. denied*, _ U.S. ___, 104 S. Ct. 2385 (1984).

It was not until long after the letter was admitted into evidence, at the close of her case in chief, that appellant withdrew her retaliation claim. She failed to ask the court to strike the EEOC letter from the evidence, and raised no objection to the court's charge on how the letter should be considered and reviewed by the jury. Appellant's failure to object to the trial court's ruling prevents her from challenging the ruling on appeal except upon proof of plain error. Fed. R. Civ. P. 51. The courts have defined plain error as error "so fundamental as to result in a miscarriage of justice." Whiting v. Jackson State University, 616 F.2d 116, 126 (5th Cir. 1984). The record in no way supports appellant's assertion that the trial court's rulings

concerning the EEOC determination were plain error resulting in a miscarriage of justice.

The judgment of the trial court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-832-CIV-KEHOE

GRECIA GONZALEZ,

Plaintiff,

v.

PUBLIC HEALTH TRUST,
a/k/a JACKSON MEMORIAL HOSPITAL,

Defendant.

JUDGMENT ON JURY VERDICT

This action came on for trial before the court and a jury, Honorable James W. Kehoe, District Judge, presiding, and the issues having been duly tried and the jury rendered its verdict,

It is

ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant recover of the Plaintiff his costs of action.

DATED at Miami, Florida, this 15th day of April, 1985.

/s/ ROBERT M. MARCH
ROBERT M. MARCH
CLERK OF COURT

by /s/ MARY B. POWELL
MARY B. POWELL

COURTROOM DEPUTY

CC: STEVEN CAHEN, ESQ.
LEE KRAFTSCHICK, ESQ.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5497

GRECIA GONZALEZ,
Plaintiff-Appellant,

versus

DADE COUNTY PUBLIC HEALTH TRUST d/b/a JACKSON MEMORIAL HOSPITAL,
Defendant-Appellee.

FILED
JUN 6 1986

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(June 6, 1986)

BEFORE: FAY, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

/s/ PETER FAY
United States Circuit Judge

APPENDIX D

Miami District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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Phone (305) 350-4491
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Grecia H. Gonzalez
1041 N. E. 154 Terrace
No. Miami Beach, FL 33162 Charging Party

Jackson Memorial Hospital
1612 N. W. 12th Ave.
Miami, FL 33126 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

All title VII jurisdictional requirements have been met. Charging Party alleges that she was discriminated against by the Respondent by being retaliated against in violation of Section 704A of Title VII of the Civil Rights Act of 1964, as amended because she previously filed an EEOC Charge (046831113) against the Respondent on 6/23/1983.

Examination of the evidence indicates there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue the

matter further, she may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of receipt of this letter, and by taking the other procedural steps set out in the enclosed Notice of Right To Sue.

On Behalf of the Commission:

9/10/84
Date

/s/ FREDERICO GOSTALES
FREDERICO GOSTALES, District Director

Enclosure
Notice of Right To Sue

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NO. 86-313

in the Supreme Court of the United States

October Term, 1986

GRECIA GONZALEZ,

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vs.

PUBLIC HEALTH TRUST, a/k/a
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Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT PUBLIC HEALTH TRUST, a/k/a JACKSON MEMORIAL HOSPITAL

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QUESTION PRESENTED

Whether a district court may admit an EEOC determination in a jury trial of an employment discrimination action if the party opposing admission raises no objection to the document's trustworthiness.

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NO. 86-313

in the Supreme Court of the United States

October Term, 1986

GRECIA GONZALEZ,

Petitioner,

vs.

PUBLIC HEALTH TRUST, a/k/a
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On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT PUBLIC HEALTH TRUST, a/k/a JACKSON MEMORIAL HOSPITAL

STATEMENT OF THE CASE

The Petitioner's statement of the case is generally accurate, but it ignores several facts important to understanding this case. The Respondent offers the following additional facts in an effort to clarify the issues raised by this petition.

The Respondent, Appellee and Defendant below, the Public Health Trust of Dade County, is responsible for the operation and maintenance of the Jackson Memorial Hospital. R.1-26-2. The Hospital operates a Pathology Department which is staffed by several hundred employees, including a large number of technicians and technologists. R.1-42-1; R.2-134, 135. The Petitioner was employed as a Medical Technologist III. R.1-26-2. In 1983, the Hospital created a new position called "Medical Technologist V", which was to be filled by reclassfying one of the existing Medical Technologists IV. R.2-95, R.3-140. As a Medical Technologist III, the Petitioner was not considered eligible for the position. R.1-42-3; R.2-146. After a series of interviews, the Hospital selected Anna Rundell, a Medical Technologist IV, for the new position. The Petitioner filed a charge with the Equal Employment Opportunity Commission challenging Ms. Rundell's promotion.

At trial, the Petitioner alleged that she was more qualified than Ms. Rundell and that the only reason she was rejected for the Medical Technologist V position was her national origin. The district court expressly rejected the Petitioner's allegations in thorough written findings, explaining that she failed to establish even a prima facie case of discrimination because she was not

a Medical Technologist IV and therefore did not meet one of the established requirements for the Medical Technologist V position. R.1-42-7. The court also found that even if the Petitioner had established a prima facie case, it was effectively rebutted by proof that Ms. Rundell was better qualified for the new position because of her significantly longer service to the Hospital, her exemplary work record, and her extensive experience in administration, budget preparation and other duties related to the Medical Technologist V position. R.1-42-8.

In addition to her claim of discrimination in promotion, the Petitioner also alleged that the Hospital retaliated against her. R.1-1. The retaliation charges were investigated by the Equal Employment Opportunity Commission which determined that there was "no reasonable cause" to believe the Petitioner's allegations were true. Although the Petitioner later abandoned her retaliation claims, the charges were included in both her complaint and the parties' pretrial stipulation. R.1-1; R.1-26-5, 10. She gave no indication in her opening statement, during her testimony or in her objections to evidence, that her retaliation claims were being abandoned until after the close of her case. Before the Petitioner announced that she was abandoning these claims, the Hospital introduced into evidence a copy of the EEOC's determination of no reasonable cause. R.2-57. At the time this document was offered, the Petitioner objected on the grounds that it was hearsay and that it was incomplete because it did not include the entire EEOC file. R.2-57. The Petitioner conceded, however, that the "jury is entitled to consider the [EEOC's] determination" and suggested only that the determination should be presented through live

testimony. *Id.* At no time did the Petitioner suggest that the determination was in any sense untrustworthy within the meaning of Fed.R.Evid. 803(8)(C).

After the Petitioner announced that she was abandoning her retaliation claims, she made no effort to have the EEOC determination removed from the jury's consideration. She never moved to have the determination stricken, and she raised no objection when the document was published to the jury, when the court proposed to instruct the jury on how the EEOC determination should be considered, or when the Hospital mentioned the determination during closing argument. R.3-185, 202, 225.

On appeal to the Eleventh Circuit, the Petitioner argued that the district court's conclusion that she was not discriminated against was contrary to the evidence and that the court should not have admitted the EEOC determination concerning retaliation because she abandoned those claims during trial. The appellate court summarily rejected the Petitioner's challenge to the sufficiency of the evidence, concluding that "the record provides ample evidence to support the trial court's findings of fact and conclusions of law that appellant failed to prove her Title VII discrimination case against appellee." The court rejected the Petitioner's contentions concerning the EEOC determination because the only objection she raised at trial, hearsay, was properly overruled. The Petitioner's remaining objections to the use of the document were waived because the Petitioner "failed to ask the court to strike the EEOC letter from the evidence, and raised no objection to the court's charge on how the letter should be considered and reviewed by the jury." Fed.R.Civ.P. 51.

REASONS FOR NOT GRANTING CERTIORARI

The Petitioner has asked the court to accept certiorari to decide whether EEOC determinations should be *per se* admissible in jury trials of employment discrimination actions or should be admitted only within the discretion of the trial court. The Petitioner's characterization of the question presented misconstrues the record below and raises issues that were never considered by the lower courts. Even if the Petitioner had properly raised this contention below, however, it would not have had any effect on the lower court's rulings. Whether the lower courts applied a *per se* rule or a discretionary rule, the EEOC determination was properly admitted in this case because there is nothing in the record to warrant its exclusion.

I.

THE PETITIONER WAIVED THE ISSUE SHE SEEKS TO RAISE IN HER PETITION FOR CERTIORARI BY FAILING TO RAISE THE ISSUE IN EITHER THE TRIAL COURT OR THE APPELLATE COURT.

The Petitioner's suggestion that the lower courts improperly adopted a *per se* rule requiring admission of EEOC determinations misconstrues the procedural posture of this case and the grounds for the lower courts' rulings. The Petitioner never suggested, and the lower courts never considered, the contention Petitioner seeks to raise before this Court that the district court should have exercised its discretion under Fed.R.Evid. 803(8)(C) to exclude the EEOC determination as untrustworthy. The Petitioner's failure to raise this

objection specifically at trial precludes her from raising it in this petition for certiorari.

There are few rules more firmly established than the requirement that objections to the admission of evidence must be specific. As this court explained nearly one hundred yeas ago,

> The rule is universal that, where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done.

Noonan v. Caledonia Mining, Co., 121 U.S. 393, 400, 7 S.Ct. 911, 915, 30 L.Ed. 1061, (1887), *quoted as authoritative in* 3A C. Wright, *Federal Practice* §841 at 284 (2d Ed. 1982). This common law rule has been incorporated into Fed.R.Evid. 103 which requires that objections be timely and state "the specific ground of objection." If an objection is not specifically raised, it may not be considered on appeal except upon proof of plain error.

At trial, the Petitioner objected to admission of the EEOC determination primarily because it was "hearsay." R.2-57. The Petitioner has since conceded that EEOC determinations are generally admissible as

an exception to the hearsay rule. Brief of Appellant at 13 ("It is conceded that existing law supports the admission of EEOC findings such as the letter which was introduced."). The Petitioner also objected to admission of the determination because it was "incomplete" in that it did not include the entire EEOC file. R.2-57. The Petitioner abandoned this contention on appeal to the Eleventh Circuit and now apparently concedes that "it is not error to exclude from evidence the EEOC investigation file . . . ." Petition for Writ of Certiorari at 8.

The only objection Petitioner raised to the admission of the EEOC determination on appeal was that it was irrelevant because she had abandoned her retaliation claims. The Eleventh Cirucit had no difficulty disposing of this issue because it was never brought to the district court's attention and was clearly not plain error. The Petitioner has since abandoned this contention.

It was not until she filed her petition for certiorari that the Petitioner first suggested that the trial court improperly applied a rule of *per se* admissibility and should have instead exercised its discretion under Fed.R.Evid. 803(8)(C) to exclude the EEOC determination as untrustworthy. This court has repeatedly held that it is inappropriate to consider for the first time on certiorari an issue that was not raised in the appellate court. *See, e.g., United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971). For the first time in nearly three years of litigation, the Petitioner now insists that the trial court should have considered the possibility that

the EEOC determination was untrustworthy. At trial, however, she never even suggested this ground for exclusion. To the contrary, she admitted that the "jury is entitled to consider the determination" and added only that she preferred that it be presented through live testimony. R.2-57. She declined to call the EEOC investigator or to subpoena any EEOC documents in an attempt to demonstrate the determination should be excluded because it was prepared inadequately. In short, she offered the trial court no reason to exercise its discretion under Fed.R.Evid. 803(8)(C) to exclude the document because "the sources of information or other circumstances indicate lack of trustworthiness." On appeal she raised the issue of relevance but never once suggested that the trial court abused its discretion under Rule 803(8)(C). Having failed to raise the issue below, the Petitioner cannot be permitted to raise the question for the first time in this petition for certiorari.

II.

THE ADMISSIBILITY OF THE EEOC DETERMINATION IN THIS CASE DOES NOT TURN UPON WHETHER THE COURT ADOPTS A *PER SE* RULE OF ADMISSION OR PERMITS ADMISSION ONLY IN THE DISCRETION OF THE TRIAL COURT.

The only reason Petitioner has advanced for why the Court should accept certiorari in this case is that she believes there is a split among the circuits over whether EEOC determinations are *per se* admissible or admissible only in the discretion of the trial court. A review of the case law reveals, however, that no court

has actually held that EEOC determinations are *per se* admissible, and the split of authority to which the Petitioner refers is largely academic. More importantly, the Petitioner has offered no basis for concluding that her case would have been decided any differently under either standard.

This Court has already considered the general issue of whether EEOC determinations are admissible in employment discrimination actions. In *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39, 96 S.Ct. 1949, 48 L.Ed. 2d 416 (1976), the Court held that while EEOC determinations are not dispositive in employment discrimination actions, they are admissible under Fed.R.Evid 803(8)(C). *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60, n.21, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (arbitral decisions concerning employment discrimination are admissible evidence and may be given such weight as the trial court deems appropriate).

The lower courts have reached the same conclusion in both jury and non-jury cases. The first court to consider the issue was the Fifth Circuit in *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972). In *Smith*, decided before the adoption of the Federal Rules of Evidence, the court concluded that EEOC determinations are admissible under the Federal Business Records Act, 28 U.S.C. §1732, as an exception to the hearsay rule. Contrary to the Petitioner's characterization of the Fifth Circuit's decision, nothing in the opinion suggests that the court was adopting a rule of *per se* admissibility. In fact, the court made it clear that it was approving admission of the EEOC

determination in part because the record revealed "no reason to suspect any lack of trustworthiness." *Id.* at 158.

The Fifth Circuit has since specifically held that EEOC determinations may be excluded if the surrounding circumstances indicate a lack of trustworthiness. In *McClure v. Mexia Independent School Dist.*, 750 F.2d 396 (5th Cir. 1985), the court approved the admission of an EEOC determination, but noted that such documents may be excluded under appropriate circumstances. The court explained that while EEOC determinations are generally admissible, a party opposing admission "may properly contend that the . . . determination is . . . inadmissible upon showing that 'the sources of information or other circumstances indicate a lack of trustworthiness', Rule 803(8)(C)." *Id.* at 400. If the party opposing admission does not so contend, of course, the court may not exclude the evidence on that basis. *Id.*

Despite the Fifth Circuit's statements in *Smith* and *McClure* that EEOC determinations may be excluded in circumstances indicating a lack of trustworthiness, in *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304 (8th Cir, 1984), the Eighth Circuit characterized *Smith* as requiring *per se* admission of EEOC determinations in all discrimination cases. The Eighth Circuit ignored the language in *Smith* indicating that trial courts retain discretion to exclude an EEOC determination if the record indicates a lack of trustworthiness, and the court did not have the benefit of the Fifth Circuit's subsequent decision in *McClure* clarifying the *Smith* standard. Based largely on this misreading of Fifth Circuit precedent, the Eighth Circuit

concluded that there was a conflict between those courts that hold EEOC determinations to be *per se* admissible and those that permit admission in the discretion of the trial court. When read properly, the Fifth Circuit rule is essentially the same as the rule applied in every other circuit. Like the Fifth Circuit, every other appellate court that has considered the issue has concluded that EEOC determinations are generally admissible but that they may be excluded in circumstances demonstrating a lack of trustworthiness. *See, e.g., Hilton v. Wyman-Gordon Co.*, 624 F.2d 379 (1st Cir. 1980) (EEOC findings are generally "significant evidence, [but] their probative force in individual cases varies considerably and is left to the determination of the trial court."); *Cox v. Babcock and Wilcox, Co.*, 471 F.2d 13 (4th Cir. 1982) (The admission of EEOC determinations are discretionary with the district court); *Baz v. Walters*, 782 F.2d 701, 705, n.2 (7th Cir. 1986) ("The EEOC's report is admissible unless it can be shown in some way not trustworthy."); *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1069 (9th Cir. 1978) (EEOC determinations are admissible but it remains for the District Court "to determine the degree of weight to be assigned to this evidence."); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 820-21 (10th Cir. 1981) (Rule 803(8)(C) allows the court to exclude EEOC reports if "the sources of information or other circumstances indicate lack of trustworthiness."); *Moore v. Devine*, 767 F.2d 1541 (11th Cir. 1985) (While EEOC determinations are generally significant, the probative force in an individual case varies considerably and is left to the discretion of the trial court.).

The Seventh Circuit summarized the case law on this subject in *Tulloss v. Near North Montessori School*,

Inc., 776 F.2d 150 (7th Cir. 1985) and concluded that while the courts appear to apply two theoretically different standards, one of *per se* admission and one of discretionary admission, the two standards are functionally similar. *Id.* at 153. Both standards grant substantial discretion to the trial court to determine the probative value of the evidence, and this "fundamental reliance on the discretion of the trial judge in all circuits reduces this 'conflict' to a largely academic issue." *Id.* In the final analysis, all courts follow the mandate of Fed.R.Evid. 803(8)(C) which permits the admission of EEOC determinations but allows for their exclusion if the surrounding circumstances indicate a lack of trustworthiness.

Whatever academic conflict may exist among the circuits, it has no bearing on this case. Under a *per se* standard or a discretionary standard, the EEOC determination in this case was properly admitted. The discretionary standard does not hold that EEOC determinations must be excluded in all cases, only that the trial court has discretion to exclude such evidence if the circumstances indicate a lack of trustworthiness. In this case, the Petitioner not only failed to produce any basis for concluding that the determination was not trustworthy, she actually admitted that "the jury is entitled to consider the determination." R.2-57. Under these circumstances, it may well have been an abuse of discretion for the court to exclude the evidence; it certainly was not an abuse of discretion to admit the evidence.

When read in context, the "conflict" among the circuits over the admissibility of EEOC determinations becomes largely academic. When applied to the facts of this case, the conflict disappears. Accordingly, this is not an appropriate case in which to accept certiorari to resolve whatever conflict may exist.[1]

[1]If any error was committed by admitting the EEOC determination, it was clearly harmless. The evidence was overwhelming that Petitioner was not discriminated against, and the district judge did not even find it necessary to mention the determination in his extensive written findings and conclusions. *Cf. McClure v. Mexia Independent School Dist.*, 750 F.2d 396, 402 (The erroneous admission of an entire EEOC file was "clearly harmless" where the district judge did not mention the contents of the file in his findings and there was substantial admissible evidence to support the jury's defense verdict).

CONCLUSION

For the reasons stated above, the Respondent respectfully urges the court to deny the Petition for Certiorari.

Respectfully submitted,

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